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8 IN THE UNITED STATES DISTRICT COURT
9 FOR THE NORTHERN DISTRICT OF CALIFORNIA
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11 LORETTA M LYNCH and CARL WOOD, No C-04-0580 VRW
12 Commissioners for the
13 California Public Utilities Commission, ORDER

14 Appellants,

15 v

16 CALIFORNIA PUBLIC UTILITIES
17 COMMISSION, OFFICIAL COMMITTEE
18 OF UNSECURED CREDITORS and
19 PACIFIC GAS & ELECTRIC COMPANY,

20 Appellees.
21 _____/

22 Appellants Loretta Lynch and Carl Wood seek a stay of
23 the United States Bankruptcy Court's January 5, 2004,
24 confirmation order implementing the modified settlement
25 agreement (MSA) between appellees Pacific Gas & Electric Company
26 (PG & E) and the California Public Utilities Commission (CPUC).
27 Doc # 35. Pursuant to the MSA, PG & E's plan of reorganization
28 (POR) is set to be implemented on April 12, 2004. Because the
implementation date is nigh, the court must rule on this matter
quickly. And because of the dispatch with which this order must

1 be issued, the court does not address all the possible issues
2 raised by the parties but rather focuses on the most glaring
3 weakness in appellants' application: the significant harm to PG
4 & E, its creditors and the public that a stay would cause and
5 the resulting sharp imbalance of hardships that a stay would
6 impose upon appellees. Based on this circumstance, appellants'
7 motion for a stay must be DENIED.

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9 I

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11 PG & E filed for bankruptcy on April 6, 2001. Memo
12 Stay (Doc # 36) at 1:27. Since that time, PG & E has been
13 involved in extensive settlement negotiations with the CPUC and
14 the Official Committee of Unsecured Creditors (OCUC), the
15 complete history of which need not be recited here. The CPUC
16 eventually approved the MSA on December 18, 2003. Id at 3:5-7.
17 Appellants, who are commissioners of the CPUC, both cast
18 dissenting votes. Id at 3:7-8. On December 22, 2003, United
19 States Bankruptcy Judge Dennis Montali issued an order
20 confirming the MSA. Id at 3:11-12. The City of Palo Alto filed
21 a motion to stay the effect of the confirmation order, with
22 which appellants joined. Judge Montali denied the motion to
23 stay on January 5, 2004. Id at 3:12-14. On that same date,
24 Judge Montali also issued an amended decision that approved the
25 MSA and addressed contested areas of state law. Id at 3:14-4:1;
26 see also In re PG & E Co, 304 BR 395 (Bankr ND Cal 2004)
27 (Montali, Bankr J).

1 Appellants filed a notice of appeal with the district
2 court on February 11, 2004. Doc # 1. The matter was originally
3 assigned to Chief Judge Marilyn Hall Patel. On February 17,
4 2004, PG & E filed a notice of related cases, contending that
5 the instant matter is related to several cases pending before
6 the undersigned. Doc # 3. Appellants filed a counternotice of
7 related cases, claiming that the case at bar is related to a
8 case pending before Judge Patel. Doc # 19. Judge Patel
9 declined to relate the case on March 17, 2004. Doc # 30.
10 Subsequently, and after conferring with Judge Patel's staff and
11 obtaining her concurrence, the undersigned related this case,
12 and the matter was reassigned on March 19, 2004. Doc # 34.

13 On March 30, 2004, appellants filed a motion to stay,
14 along with a motion to shorten time for hearing of that motion.
15 Docs ## 35, 37. All three appellees opposed the motion to
16 shorten time, and PG & E also filed a motion to dismiss. Docs
17 ## 41, 42, 44, 46. In light of the impending April 12, 2004,
18 POR implementation date, the court scheduled the matter for an
19 April 9, 2004, hearing date. The appellees all filed
20 oppositions to the motion to stay at noon on April 8, 2004.
21 Docs ## 59, 65, 66. Appellants filed a reply brief on the
22 evening of April 8. Doc # 67. The court conducted a hearing on
23 the matter on April 9, 2004.

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25 II

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27 The standard of review of bankruptcy court decisions
28 varies with the question raised on appeal. Conclusions of law

1 are reviewed de novo. In re Pace, 67 F3d 187, 191 (9th Cir
2 1995). Mixed questions of fact and law are likewise reviewed
3 de novo. In re Bammer, 131 F3d 788, 792 (9th Cir 1997).
4 Findings of fact are reviewed for clear error. Pace, 67 F3d at
5 191. When a bankruptcy court has ruled on the issue of a stay
6 of its order pending appeal, the district court reviews that
7 decision for an abuse of discretion. Universal Life Church,
8 Inc, v United States, 191 BR 433, 437 (ED Cal 1995) (Wanger, J)
9 (citing In re Wymer, 5 Bankr 802, 807 (9th Cir BAP 1980)).

10 Federal Rule of Bankruptcy Procedure 8005 governs a
11 motion to stay a bankruptcy judge's order on appeal. Appellants
12 seeking a discretionary stay under Rule 8005 "must meet the
13 terms of a test virtually identical to that for a preliminary
14 injunction." In re PG & E, 2002 WL 32071634, *2 (ND Cal)
15 (Walker, J) (discussing analogous standard to be employed on
16 motion to stay under FRBP 8017(b)). In other words, appellants
17 must show: (1) a likelihood of probable success on the merits
18 and the possibility of irreparable injury; or (2) that serious
19 questions going to the merits are raised and the balance of
20 hardships tips sharply in its favor. Southwest Voter
21 Registration Education Project v Shelley, 344 F3d 914, 917 (9th
22 Cir 2003) (en banc, per curiam); Roe v Anderson, 134 F3d 1400,
23 1401-02 (9th Cir 1998). Some courts employ a slightly modified
24 version of this test when evaluating a Rule 8005 motion to stay,
25 finding that appellants must show that: (1) appellants are
26 likely to succeed on the merits of the appeal; (2) appellants
27 will suffer irreparable injury; (3) no substantial harm will
28 come to appellees; and (4) the stay will do no harm to the

1 public interest. Universal Life Church, 191 BR at 444; see also
2 In re Great Barrington Fair & Amusement, Inc, 53 BR 237, 239
3 (Bankr D Mass 1985) (Glennon, Bankr J). Under either
4 formulation, the relative hardship to the parties is a "critical
5 element" in determining whether a stay is warranted. See Lopez
6 v Heckler, 713 F2d 1432, 1435 (9th Cir 1983).

7 With respect to the instant matter, appellants' case
8 suffers from several weaknesses. One such problem involves
9 appellants' standing to request such extraordinary relief.
10 Appellees have raised several potential problems with
11 appellants' standing to bring this appeal in the first instance,
12 much less to request a stay, including: (1) appellants' failure
13 timely to object to the MSA on the grounds upon which they
14 appeal; and (2) appellants' lack of a personal stake in the
15 outcome of these proceedings.

16 The court need not consider this issue in detail but
17 nevertheless notes that appellants' arguments regarding standing
18 appear unlikely to succeed. Appellants have standing to appeal
19 the order confirming the MSA only if they are "directly and
20 adversely affected pecuniarily by [the] order * * *." In re
21 PRTC, Inc, 177 F3d 774, 777 (9th Cir 1999) (citation omitted).
22 The personal stake that appellants claim is the possible
23 impairment of their First Amendment rights under ¶ 19 of the
24 MSA. That provision requires the parties to the MSA to
25 "support" the MSA in all judicial, administrative and legal fora
26 and to "cooperate" in the efforts to consummate the MSA. But at
27 the April 9 hearing, appellees disclaimed any interpretation of
28 ¶ 19 that would prevent appellants as individual commissioners

1 from criticizing the MSA. Under the circumstances, the court
2 would find it difficult to conclude that appellants have a
3 personal interest that could be adversely affected by the
4 confirmation order. Appellants are simply on the losing side of
5 a vote in the CPUC. The intensity of appellants' conviction
6 that the CPUC majority acted incorrectly does not convert that
7 conviction into a personal loss to support Article III standing.
8 Even assuming that the grounds upon which appellants challenge
9 the MSA raise serious legal questions, this apparent lack of
10 standing would undermine any conclusion that appellants might
11 prevail on the merits of the appeal.

12 But the uncertainty of appellants' standing is not the
13 most fundamental problem with the present motion. Even assuming
14 that appellants have a personal pecuniary interest implicated by
15 Judge Montali's confirmation of the MSA, appellants would
16 nonetheless fail to demonstrate that the balance of the
17 hardships favors the issuance of a stay. In its opposition
18 brief, PG & E lists a range of financial harms that would result
19 to it, should the court stay the confirmation order and prevent
20 the POR's implementation. PG & E contends that a stay would
21 jeopardize its \$6.7 billion in financing, which has been
22 obtained only after lengthy and complex negotiations. PG & E
23 Opp (Doc # 65) at 9:22-28. PG & E also notes that, for each day
24 the POR is delayed, PG & E is liable to its bond holders and
25 creditors for an additional \$1.7 million in interest. Id at
26 10:1-5. A delay of more than 90 days would require PG & E to
27 return the bond proceeds to the buyers and to pay massive
28 redemption premiums, which could result in a total cost of \$210

1 million. Id at 10:11-16. Additionally, PG & E would then be
2 required to return to the market and attempt to raise several
3 billions of dollars in alternative financing. Id at 10:17-20.
4 The total cost to PG & E of a stay could thus be many millions -
5 if not billions - of dollars, not to mention the possibility
6 that such delay and costs might put the POR at a substantial
7 risk of failure. Such risks and costs constitute significant
8 injury militating against the issuance of a stay. See, e g, In
9 re Public Service Co of New Hampshire, 116 BR 347, 350 (Bankr D
10 NH 1990) (Yacos, Bankr J).

11 Additionally, PG & E's creditors would face substantial
12 hardship as the result of a delay. PG & E represents that it is
13 prepared to pay approximately \$8.4 billion to its creditors on
14 the POR's effective date. PG & E Opp at 13:22-14:2. Staying
15 the MSA confirmation order would likely cause a substantial
16 delay and, if the entire plan were undermined, could possibly
17 result in creditors not receiving payment at all. Under the
18 circumstances, such delay of payment constitutes significant
19 harm warranting the denial of a stay. Public Service Co, 116 BR
20 at 350.

21 Furthermore, a stay would jeopardize the public's
22 interest in resolution of bankruptcy proceedings involving
23 California's largest public utility. That public interest is
24 fostered by implementation of the MSA. Although the MSA
25 constrains the CPUC's future conduct in certain respects, the
26 MSA does not surrender or abnegate the CPUC's regulatory
27 authority. See Southern California Edison Co v Peevey, 31 Cal
28 4th 781 (2003).

1 By contrast, appellants' interests in securing a stay
2 are insubstantial. The only clear interest that appellants were
3 able to articulate at the April 9 hearing is their interest in
4 not having their First Amendment rights infringed. Even
5 assuming that the court agrees with appellants that a provision
6 such as ¶ 19 of the MSA constitutes a prior restraint on speech,
7 the jeopardy created by that provision has largely been
8 alleviated. PG & E and the CPUC stipulated at the April 9
9 hearing that ¶ 19 should not be interpreted to restrict
10 appellants in their individual capacity as CPUC commissioners
11 from criticizing the MSA. Moreover, any issues presented by
12 forcing appellants to "cooperate" in efforts to implement the
13 MSA largely become moot the moment the plan becomes effective.
14 Appellants' interests simply do not compare with the grave harms
15 that would result to PG & E, its creditors and the public if a
16 stay is issued. No reasonable amount of bond could protect the
17 very substantial interests that a stay would jeopardize.

18 The substantial harm that would result to appellees is
19 sufficient alone to deny the application for a stay. The court
20 need not at this time fully consider the arguments advanced
21 regarding the merits of the underlying legal questions, nor need
22 the court elaborate further upon the impact of a stay upon the
23 public interest. It is evident that Judge Montali did not abuse
24 his discretion in refusing to stay his confirmation order, and
25 appellants' motion to stay the confirmation order (Doc # 35)
26 must be DENIED.

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III

Appellants have failed to demonstrate that the balance of the harms favors the issuance of a stay. Accordingly, appellants' motion to stay Judge Montali's order confirming that MSA (Doc # 35) is DENIED.

To permit appellants to seek relief in the court of appeals, the court STAYS this order until 6:00 pm on April 9, 2004, and such further time as the court of appeals may order.

IT IS SO ORDERED.

VAUGHN R WALKER
United States District Judge